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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. SOCORRO LOPEZ, Defendant and Appellant.	B206130 (Los Angeles County Super. Ct. No. SA058453)

APPEAL from a judgment of the Superior Court of Los Angeles County. James R. Brandlin, Judge. Reversed and remanded.

Gloria C. Cohen, under appointment by the Court of Appeal for Defendant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant appeals his conviction of one count of operating a chop shop (Veh. Code, § 10801), and one count of receiving stolen goods (Pen. Code, § 496, subd. (a)). He contends that the trial court erred in denying his motion to suppress and in staying, rather than striking, his conviction for receiving stolen property. We conclude the trial court erred in denying defendant's motion to suppress under Penal Code section 1538.5, and reverse the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

David Gilmore owned a mustard-gold 1971 Chevy Malibu, License No. 915DLU. On August 23, 2005, at about 8:30 p.m., he parked it in front of his apartment in Culver City. On August 24, 2005, at about 5:00 a.m., he noticed it was stolen and called the police.

On September 21, 2005, he met with detectives at the Classic Tow Yard in Marina del Rey and identified his car. The car was now white, the back bumper and front seat had been replaced, the back seat was missing, a dent in the right front fender had been fixed, and there were different tires and rims on the car. The car's Optimum battery was missing.

On October 14, 2005, Gilmore met detectives at the U.S. Tow Yard. Gilmore identified more parts to his car, including the back seat, the front seat, the passenger and driver's side door panels, the back bumper, and three out of the four original tires on the car.

Randolph Lebert owned a white two-door 1970 Chevy Malibu. The car had no transmission, and was "totaled out." Lebert's son knew someone who wanted to buy it, and Lebert spoke to someone named Jesse[1] on the phone, regarding the car. After the conversation, two men picked up the car, paying him $250. Because he did not have the pink slip, he asked for their address. Approximately three days later, he went to Classic Tow; he did not see anyone on the lot, and shook the gate and waited about half an hour.

[1] Defendant is also known as "Jesse Lopez."

When he came back, he was told to leave the paperwork at the office. He gave the pink slip to a security guard. Lebert saw newer cars by the gate and older cars in the back of the lot.

At trial, Lebert identified his car from a photograph. The car had new flames painted on it, and it was missing the bumper. The license plate had been changed.

Francisco Rodriguez works at Earl Scheib. In September 2005, he spoke with police about a 1971 Chevy Malibu that had been brought in for painting. He identified Lebert's car from a photograph, and identified defendant from a six-pack photo array. Harold Langsford, the manager of Earl Scheib, testified that on September 12, 2005, Earl Scheib painted a 1971 Chevy Malibu bright white. He was unable to identify for police the person who dropped off the car.

Detective LaWayne Stift of the Los Angeles Police Department, who conducts Vehicle Code section 2805 searches, went to Classic Tow on September 16, 2005 for that purpose. He had three other officers with him. At the time, a man named Sal Lopez was at the lot. There were about 15 to 20 cars, a forklift, and a scissor lift.

The officers' attention was drawn to two Chevy Malibus on the lot, one in good condition and one in wrecked condition. The wrecked Malibu had no VIN visible. Detective Stift determined the vehicle was registered to Blanca Torres. DMV records disclosed that Lebert had sold the vehicle to Torres. The other Chevy Malibu was white, with an undercoat of yellow paint. The car had no rear seats and the bumper had been changed. The VIN number on the dash was not the true VIN number. DMV records disclosed that Gilmore had applied for a duplicate title and replacement license plates.

The search team found the Optimum battery from Gilmore's car in one of Classic Tow Yard's tow trucks. On October 13, 2005, they executed a search warrant at Classic Tow and found Gilmore's tires and rear bumper.

Detective Stift testified it is common for individuals who engage in auto theft and VIN switching to purchase a "salvage" vehicle, which is a wrecked car or a previously stolen car, and to use the VIN number from the wrecked car on a stolen car. Cutting up the salvage car is common and is done to destroy the evidence that there is another car.

He believed defendant knew the Gilmore Malibu was stolen because they had placed Lebert's VIN number on it.

Classic Tow Yard is owned by Esperanza Lopez, defendant's sister. Defendant was the manager of the lot.

Morton Howard testified for the defense that he worked across the street from Classic Tow. Classic Tow always had a "bunch of junk in the yard." He saw the scissor lift in the yard before Classic Tow moved in.

Blanca Torres has been married to defendant for 14 years. She testified that Classic Tow moved to Venice Boulevard in March 2005. At Classic Tow, they bought cars to sell, but sometimes they would keep them. As a rule, they would verify that the car they purchased matched its paperwork by checking the VIN; however, when she bought the Gilmore Malibu, she did not pay attention to the VIN. She never saw the Lebert Malibu. A woman named Joanne Scurlock sold her both Malibus.

The jury convicted defendant on counts 1 and 2, and deadlocked on counts 3 and 4 (also alleging receipt of stolen property (Pen. Code, § 3496, subd. (a)). The trial court granted the defense motion to dismiss counts 3 and 4 pursuant to Penal Code section 1385.

DISCUSSION

I. MOTION TO SUPPRESS.

Defendant argues the trial court erred in denying his motion to suppress the fruits of the search of the Classic Tow yard because he had a reasonable expectation of privacy in the lot; the prosecution did not establish it was a closely regulated business within the meaning of Vehicle Code section 2805;[2] and the prosecution failed to present necessary testimony in violation of *People v. Johnson* (2006) 38 Cal.4th 717, 726.

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[2] Vehicle Code section 2805, subdivision (a) provides, "For the purpose of locating stolen vehicles, (1) any member of the California Highway Patrol, or (2) a member of a city police department, a member of a county sheriff's office, or a district attorney investigator, whose primary responsibility is to conduct vehicle theft investigations, may

A. Factual Background.

Defendant filed a motion to suppress asserting the tow yard was not within the scope of a warrantless administrative search because the premises were not open to the public. He sought to suppress all observations made by police, any statements by defendant following the search, the identification of the defendant, and the vehicles discovered at the premises. The prosecution responded that, because defendant did not own the lot, he had no expectation of privacy; and further that the search was proper because the tow yard was the type of business regulated by section 2805.

At the hearing, the court advised defendant it had reviewed the preliminary hearing testimony and the prosecution's opposition, which attached unverified exhibits including a copy of a tow service agreement and a photo of the outside of the tow yard showing a sign with a phone number on it that the public could call. The court advised defendant it was "not to go forward with the hearing unless you can establish that the facts as alleged" in the prosecution's papers were inaccurate. The prosecution called no witnesses.

The defense called Blanca Torres who testified that defendant, who is her husband, is the manager of Classic Tow, and made decisions concerning which cars to keep on the lot. She also testified concerning the operation and management of the lot.

Defendant argued that section 2805 is limited to its specifically enumerated types of businesses. The prosecution contended the Legislature did not intend to limit the scope of section 2805 to the enumerated types of shops.

The court denied the motion, relying in part on testimony from the preliminary hearing, finding that defendant had disclaimed any expectation of privacy in the lot, and

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inspect any vehicle of a type required to be registered under this code, or any identifiable vehicle component thereof, on a highway or in any public garage, repair shop, terminal, parking lot, new or used car lot, automobile dismantler's lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment, or any agricultural or construction work location where work is being actively performed, and may inspect the title or registration of vehicles, in order to establish the rightful ownership or possession of the vehicle or identifiable vehicle component."

that the lot was a closely regulated business within section 2805 based upon the statute and the regulatory scheme.

B. Discussion.

Generally, the Fourth Amendment prohibits unreasonable searches and seizures of commercial premises as well as private homes. (*De La Cruz v. Quackenbush* (2000) 80 Cal.App.4th 775, 780-781; *New York v. Burger* (1987) 482 U.S. 691, 699.) Evidence obtained in violation of the Fourth Amendment is subject to the judicially developed exclusionary rule precluding its use in a criminal proceeding against the victim of the illegal search and seizure. The primary purpose of the exclusionary rule is to deter future unlawful police conduct and effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. (*People v. Hull* (1995) 34 Cal.App.4th 1448, 1453-1454.)

Defendant contends that because the prosecution failed to present any testimony at the suppression hearing it failed to meet its burden to establish the search was reasonable. We agree.

At a Penal Code section 1538.5 hearing to suppress evidence obtained with a warrantless search, the defendant must make a prima facie showing that the police acted without a warrant. (*People v. Williams* (1999) 20 Cal.4th 119, 136.) Where, as here, there is an issue whether defendant had a reasonable expectation of privacy necessary to establish standing, this showing is also defendant's burden. (*In re Lance W.* (1985) 37 Cal.3d 873, 882-883; *People v. Thompson* (1990) 221 Cal.App.3d 923, 936-937.) Thereafter, the burden of proving justification for the warrantless search rests with the prosecution. (*Id.* at pp. 136-137.) Penal Code section 1538.5 requires that the prosecution meet this burden through live testimony at the hearing. (*People v. Johnson* (2006) 38 Cal.4th 717, 726-727.)

Here, the proceedings were inadequate in several respects. First, the trial court relied in part on the testimony from the preliminary hearing in considering defendant's expectation of privacy, in lieu of the live testimony required to controvert defendant's showing at the 1538.5 hearing. Second, with respect to the prosecution's burden, by

stating it would only hear evidence if the defense could establish that the arguments made in the prosecution's papers were inaccurate, the court improperly placed the burden on the defense. (See *People v. Williams, supra,* 20 Cal.4th at pp 136-137.) Finally, the prosecution's opposition did not include any evidence, but merely attached unverified exhibits. Thus, even if contrary to the holding of *People v. Johnson, supra*, 38 Cal.4th at pp. 726-727, evidence could be presented other than through testimony at the hearing, there was no such evidence. We therefore reverse.[3]

DISPOSITION

We reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

[3] Because we reverse on these grounds, we need not reach the other issues addressed by appellant.